UNITED STATES

v.

ROBERT W. MILLER

MARJORIE E. MILLER

IBLA 94-146 Decided February 26, 1997

Appeal from a decision of District Chief Administrative Law Judge John R. Rampton, Jr., declaring the Robin Redbreast Lode mining claim null and void. Colorado 754.

Reversed.

1. Administrative Procedure: Generally--Hearings--Mining Claims: Contests--Rules of Practice: Appeals: Generally--Rules of Practice: Hearings

   Where, at the close of the Government's case-in-chief, a contestee moves for dismissal of the complaint on the ground that a prima facie showing has not been made, it is error for an administrative law judge to fail to rule on this question prior to requiring the contestee to proceed with its presentation.

2. Administrative Procedure: Burden of Proof--Rules of Practice: Government Contests

   The determination of whether or not the Government has presented a prima facie case of invalidity in the contest of a mining claim is made solely on the basis of the evidence introduced in the Government's

case-in-chief, which includes testimony elicited in cross-examination. If, upon the completion of the Government's presentation, the evidence is such that, were it to remain unrebutted, a finding of invalidity would properly issue, a prima facie case has been presented and the burden devolves on the claimant to overcome this showing by a preponderance of the evidence.

3. Administrative Procedure: Burden of Proof--Rules of Practice: Government Contests

In general terms "prima facie evidence" is evidence which is sufficient in law to sustain a finding in favor of a rule or order, but which may be contradicted. While the Government has the burden of going forward in a mining claim contest with sufficient evidence to establish a prima facie case of invalidity of the claim, it is the claimant who is the actual proponent of the rule that the claim is valid and it is the claimant who ultimately must bear the burden of persuasion.

4. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

While the minimum wage establishes the floor for determination of the value of the claimant's labor, where there is independent evidence establishing that the market value of the labor necessary to mine a deposit is greater than that provided by the minimum wage, it is the market value which is properly used to determine whether or not a prudent man would expend his effort and means to develop a paying mine.

5. Administrative Procedure: Adjudication--Rules of Practice: Appeals: Generally

Under the doctrine of "law of the case," a court is precluded from reexamining an issue previously decided by the same court or a higher appellate court in the same case. It does not, however, preclude a reviewing court from reversing a ruling of a trial court on direct review of that decision. Thus, insofar as the Board's review is concerned, nothing in the "law of the case" doctrine negates either the Board's authority or its obligation to correctly apply prevailing legal precedents, notwithstanding any contrary ruling by an administrative law judge.

APPEARANCES: Luke J. Danielson, Esq., Boulder, Colorado, for appellant; Daniel B. Rosenbluth, Esq., Office of the General Counsel, U.S. Department of Agriculture, Denver, Colorado, for the U.S. Forest Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Marjorie E. Miller and Robert W. Miller have appealed from a decision of District Chief Administrative Law Judge John E. Rampton, Jr., dated November 12, 1993, declaring the Robin Redbreast Lode mining claim, located in sec. 34, T. 45 N., R. 6 W., New Mexico Principal Meridian, within the Uncompahgree National Forest, null and void.

On February 4, 1992, the Bureau of Land Management (BLM), at the request of the U.S. Forest Service (Forest Service or FS), U.S. Department of Agriculture, initiated this proceeding by issuing a contest complaint alleging (1) "[n]o valuable mineral deposits have been discovered within the boundaries of the Robin Redbreast Lode," (2) "[t]he lands within the boundaries of the Robin Redbreast Lode mining claim are nonmineral in character," and (3) "[t]he Robin Redbreast Lode mining claim is not being held in good faith for the purpose of developing a valuable mineral." The Millers filed an answer to the complaint and on May 25, 1993, Judge Rampton held a hearing on the contest in Montrose, Colorado.

The Robin Redbreast Lode mining claim is in the Porphyry Basin of the Big Blue Wilderness Area, at an elevation of about 11,400 feet, a 2-hour

hike from the nearest road (Tr. 13). Congress created the Big Blue Wilderness Area in 1980, and provided that the area would be closed to mining location on January 1, 1984, subject to valid existing rights (Exh. FS-2 at 2; Tr. 19).

On July 7, 1938, three men, including Marjorie Miller's father, Elmer Eipper, located the "Robin Red Breast" lode mining claim on the site of a previous claim called the "Vindicator," located in 1896 by Alexander Van Boxel (Exh. MC/D-9; Tr. 192). 1/ In 1950 or 1951, Eipper conveyed his interest in the "Robin Red Breast" lode mining claim to the Millers (Tr. 183). On February 1, 1980, BLM declared that claim abandoned and void, along with four other claims held by the Millers, for failure to comply with the recordation requirements of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1994), and 43 CFR 3833.1-2(d) (1979), relating to filing fees. 2/ The Millers relocated the claims, including the claim at issue (CMC 164159), on August 31, 1980, prior to the wilderness designation (Tr. 185; Exh. FS-2 at 1).

1/ At the hearing, the Judge stated that the parties' exhibits should be designated "MC" and "FS," "rather than Contestee and Contestant * * * MC for mining claim, and FS for the Forest Service" (Tr. 20). Transcript and briefing references are to exhibits with the designation MC or FS; however, appellants' exhibits in the record are marked "Defendant's Exhibit," followed by a number, and, in his decision, Judge Rampton referred to them as "D-," followed by a number. In this decision, we will refer to the appellants' exhibits as "MC/D," followed by the appropriate number.
2/ On Dec. 29, 1980, the Board upheld that decision. See Robert W. Miller, 51 IBLA 364 (1980).

At the hearing, the parties stipulated that the Millers were, in fact, holding the claim in good faith. 3/ The hearing proceeded on the first two issues in the complaint. The Government presented its case through the testimony of two witnesses, Lewis French, a forester on the Ouray Ranger District with minerals training, and John S. Dersch, a Forest Service mineral examiner (Tr. 10-11, 26).

French testified that, during his 16 years of working in the Ouray District, he had visited the claim "many times" (Tr. 12). When asked to describe the mining activity and improvements on the claim, he stated that

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3/ We note that, at the opening of the hearing, Forest Service counsel declared "[w]e feel that it's as clear as the Colorado mountain stream that Claimants have made a good faith, honest effort to discover valuable minerals on their lode" (Tr. 8). During the course of cross-examination, the Forest Service mineral examiner, who had recommended that this charge be included in the contest complaint, was asked whether he had "any evidence here that they're engaged in some kind of a subterfuge or doing anything other than honestly trying to pursue minerals up there?" To which he responded, "Not in the least" (Tr. 64-65). He explained that the "bad faith" charge had been included because "[i]t is a common practice that the [charge] is always added in, and more often than not that particular objective is thrown out very quickly in the hearing" (Tr. 64).

In this regard, we wish to emphasize that there is no such thing as a "standard" charge in a contest complaint. While there have been a number of cases in which the allegation of "bad faith" does, indeed, appear to have been just "added in" without regard to whether or not there is any evidence to support this allegation, we wish to make it clear that the Board looks upon this practice with extreme disfavor. The charge that a claim has been located in "bad faith" is a serious charge, one which, if proven, can invalidate a claim even if the claim is supported by a discovery. See, e.g., United States v. Zimmers, 81 IBLA 41 (1984); In re Pacific Coast Molybdenum, 75 IBLA 16, 90 I.D. 352 (1983). Such a charge is not to be included in a contest complaint unless the Forest Service has reason to believe that the claim is not being held, in good faith, for mining purposes. Where, as here, the Forest Service readily admits the good faith of the mining claimants and merely asserts that the claim under contest is not supported by a discovery, inclusion of such a charge is clearly improper.

there was a 10 by 20-foot cabin, a 35-foot adit, and a vertical shaft, referred to at the hearing as the Van Boxel shaft, that had originally been sunk by Van Boxel around the turn of the century, and reopened by the Millers (Tr. 11-12). He estimated the shaft to be about 20 feet deep and he stated that "there might be some horizontal workings extending from there" (Tr. 12). French testified that, while contestees had conducted "prospecting" and "exploration" underground, he had observed no evidence of mineral development or production. Id.

The Forest Service's primary witness, Dersch, testified that he had conducted a mineral examination of the claim on September 1-2, 1987, and on August 30-31, 1988 (Tr. 32-33). Each time he was accompanied by the Millers (Tr. 33). Dersch found the Millers very helpful in showing him around the claim (Tr. 33, 40). Robert Miller showed Dersch where he thought the best samples could be obtained (Exh. FS-2 at 4; Tr. 50). He and the Millers agreed on all of his sampling locations (Tr. 39-40, 60).

Dersch's sampling methods, the location and description of samples, and the value totals for 1987 and 1988 are set out in his Mineral Report for the claim, dated August 1, 1991 (Exh. FS-2). Dersch took seven channel samples, three from a vein system measuring about 40 inches wide in the creek bottom (Nos. 773, 774, and 775), one in the prospect pit across the creek from the Van Boxel shaft (No. 1476), and the three in the drift (Nos. 1477, 1479, and 1480), which he described as running east approximately 25 feet from the base of the shaft (Tr. 44-46; Exh. FS-2 at 4-5,

17). 4/ He also took one grab sample (No. 1478) from the dump of an old mine known as the Porphyry Basin Mine (Tr. 45; Exh. FS-2 at 5, 17).

Dersch bagged, tagged, and hand delivered the claim samples to Bondar-Clegg and Company, Inc., of Lakewood, Colorado, for assaying for gold, silver, copper, lead, and zinc. The results of those assays are set forth on page 6 of the Report and indicate that, based on the highest commodity price for either 1987 or 1988, the samples ranged in value for total minerals from $1.07 to $64.85 per ton. Sample No. 775, which contained the greatest amount of gold (0.136 ounces per ton (oz./T)), was valued at $64.85, while the sample (No. 1479) with the least amount of gold (less than 0.002 oz./T) yielded $1.07 per ton.

Also included in Dersch's Report is a copy of an August 28, 1987, assay by Root & Norton Assayers of Silverton, Colorado, which was provided to Dersch by the Millers, showing gold and silver values for three samples (Exh. FS-2 at 35). One sample, described as "big rock, black vein," lists the highest value for gold, 0.964 oz./T. Dersch testified that this value was "an excellent result," but, since it was just a rock sample, it did not "constitute a true representation of a mining width, an area that needs to be mined in order to run an operation" (Tr. 51). He stated further that

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4/ Dersch described the conditions in the drift during his 1988 sampling as "very wet. While we were taking our samples and discussing the situation, water was percolating in everywhere; and there was even some small slides that were occurring inside" (Tr. 48). He thought the shaft would need to be cleaned out yearly because of its location adjacent to a creek on the claim. Id.

since there was no indication where this particular sample came from it would not be representative of "what one might find" (Tr. 52).

In his mineral report, Dersch prepared two economic analyses of possible development of the claim, one at the time of the withdrawal and one at the time of the hearing. For the purpose of these analyses, he utilized the assay results from sample No. 775 and assumed a drifting method of mining the surface exposed vein at depth as outlined in Exploration and Development of Small Mines by Harry E. Krumlauf, published in 1966 by the Arizona Bureau of Mines. See Exh. MC/D-2. Under this method, one miner and three muckers would advance a 5-foot wide by 7-foot high drift 4 feet per day. In order to ascertain the likelihood of success, Dersch proceeded to develop figures with respect to the value of production versus the cost of mining.

To ascertain the value of production, Dersch first noted that, assuming a heading of 5 feet by 7 feet with a 4-foot advance per day, the total volume of material for a day's mining would be 140 cubic feet. Working with a vein width of 39 inches, Dersch ascertained that approximately 49 cubic feet of the day's total would be waste, leaving 91 cubic feet of mineral bearing material. In an attempt to convert the total of cubic feet of mineral material (91) into tons, Dersch took this number, multiplied it by the figure 22.2, which represented the pounds of recoverable ore per cubic foot based on the spectrographic analysis of sample

No. 775, 5/ and divided it by 2,000 (pounds per ton), thereby deriving a figure of 1.01 tons of "ore."

Dersch then computed the per ton value of the ore at 1984 prices by multiplying the assay returns for gold, silver, copper, lead, and zinc. He arrived at a total value of $54.67 per ton. Multiplying this amount by 1.01 tons, the total derived above, Dersch concluded that the total value of a day's mining would be $55.22.

Dersch next computed the costs of a day's mining. Initially, he calculated the hourly wage costs for a miner and mucker as $11.02 and $8.73, respectively. 6/ The labor costs for a crew of one miner and three muckers working an 8-hour day was computed as $88.16 for the miner and $209.52 for the muckers. Based on Krumlauf's analysis, Dersch then computed the cost of supplies for the crew as 40 percent of the labor costs, or $119.07 per 8-hour shift. To this total, he then added a cost of $168.02 per foot of

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5/ Though his mineral report asserts that these figures were derived from sample No. 929 (see Exh. FS-2 at 8), this is clearly wrong. There was no sample No. 929. Based on the assay results included in the report, it is clear that he utilized the percentages shown in sample No. 775 (see FS-2 at 29). Dersch computed the in-place weight of the ore by first converting the assay returns showing presence of minerals in parts per million (700 for zinc, 70 for lead, and 50 for copper) into a figure showing percentage composition of the mineralized zone (0.07 percent for zinc, 0.007 percent for lead, and 0.005 percent for copper). He then multiplied these figures by the weight of ores for zinc (sphalerite), lead (galena), and copper (chalcopyrite) and concluded that in each ton of ore there would be 17.7 pounds of zinc, 3.2 pounds of lead, and 1.3 pounds of copper.

6/ The wage calculations were based on the wages paid by three local mines, together with a wage-estimate obtained from a mining cost service and the prevailing minimum wage adjusted for the burden of taxes and social security. These five items were averaged to arrive at the figures utilized. See Exh. FS-2 at 7.

drifting, resulting in an additional $672.08. Dersch testified that this cost, too, was derived from Krumlauf's analysis, adjusted for inflation. See Tr. 93-94; Exh. MC/D-2 at 13. Dersch then added the above amounts, arriving at a total cost for a day's mining of $1,088.83. In effect, using the 1984 figures, the costs of mining exceeded the value of the mineral recovered by more than $1,033 for each day of work. Employing similar calculations for the time of the hearing, Dersch determined that there would be a net loss of $1,141.66 per day. Dersch concluded that the claim was clearly not supported by a discovery of a valuable mineral deposit. Dersch noted that this conclusion was reached without any consideration of milling or transportation costs (Tr. 58).

The value of Dersch's economic analysis, however, was critically undermined on cross-examination. Counsel for contestees inquired in considerable detail as to the derivation of Dersch's valuation figures. Counsel pointed out that, under the computations utilized by Dersch to evaluate the claim, 91 cubic feet of ore would weigh 1.01 tons (Tr. 75). Counsel then led Dersch through a series of calculations designed to establish that this figure was simply not credible. Thus, since quartz had a weight of 166 pounds per cubic foot, 91 cubic feet of quartz would be in excess of 7-1/2 tons (Tr. 76). Moreover, inasmuch as the minerals within the quartz were denser, the tonnage would be above the 7-1/2 ton figure (Tr. 77). Pursuing this line of inquiry, counsel questioned Dersch:

> Q. [By Mr. Danielson] Okay, So if you have in that seven and a half tons of material -- maybe closer to eight tons of

material -- but if you use the seven and a half ton figure and your point -- what's your figure for the gold value? You were using zero point one three six ounces per ton?

A. Yes, that's the value?

Q. Okay. So in that seven and a half tons of material, how much gold would there be?

A. In the seven and a half tons of material?

Q. Yes. If there's zero point three six ounces per ton, and you have seven and a half tons, how much material is there in gold?

A. An ounce of gold?

Q. An ounce of gold. And what was the price per ounce of gold that you used in your --

A. Well, yeah, understanding what you're after, it would be three hundred and eighty-one dollars. Well, a little more, because it is a little better than an ounce.

Q. And in addition you put in some small values for some of those materials?

A. (Witness nods.)

Q. So what you're really talking instead of the $55 that you had in here, which would be yielded by a four-foot advance we're really talking about something on the order of $800, or $400, aren't we?

A. With the approach you -- with the approach you're using.

Q. What's wrong with my approach?

A. I think that -- I don't believe you've given fair consideration to the other commodities that are present, and -- well, I'll leave it at that.

(Tr. 81-82). 7/

7/ We recognize that, notwithstanding the foregoing, Dersch continued to assert that his valuation of the minerals was correct. Thus, when he was later asked whether he continued to believe that the ore zone material would weigh 22 pounds per cubic foot, Dersch responded, "Unless I've

Counsel for contestees also reviewed the computations used to develop mining costs. Initially, counsel questioned Dersch's decision to assume a 5-foot mining width, in view of the fact that the BLM Handbook for Mineral Examiners expressly noted that "in small vein or lode deposits, the minimum mining width of any operation is 3 feet." See Exh. MC/D-4 at V-2. When counsel adverted to the fact that the width of the ore zone was 39 inches and suggested that the effect of expanding the drift from a 3-foot drift to a 5-foot drift was to add what was essentially waste material, Dersch agreed (Tr. 67).

Counsel also inquired with respect to the derivation of other aspects of the projected costs of mining. Dersch recounted that in determining mining costs he had primarily relied on Krumlauf's analysis, updated for inflation occurring since 1966 (Tr. 79-80). As Dersch explained it again, he had independently arrived at the daily wage costs for one miner and three muckers who could mine 4 feet per day and then, following Krumlauf's procedures, added an additional 40 percent of that total as representing the cost of supplies. To this total, Dersch had added an additional amount for drifting costs based on data provided in Krumlauf's study determining the cost for each foot of advance, adjusted for inflation.

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fn. 7 (continued)
done something wrong, I'd have to stand on what I did here" (Tr. 84). Later, while he conceded that the total amount of ore per round would be 7.28 tons, he continued to assert that his ultimate value computation was correct. To similar effect was a subsequent colloquy on redirect examination (Tr. 111-13). But see Tr. 89. We note, however, that in its subsequent post-hearing brief, the Forest Service chose not to defend these calculations. See Government Post Hearing Brief at 6-7.

Counsel pointed out, however, that Krumlauf's per foot cost for "drifting" was actually derived by taking the daily wage costs and the costs of supplies predicated on a 4-foot per day advance and dividing them by four to ascertain the per foot costs of production (Tr. 93-95). In other words, the costs which Krumlauf had shown as "drifting" costs were not additional costs but merely a different way of presenting the wage and supply costs set forth previously. Adding these costs to the wage and supply costs, in effect, constituted a double-counting. While Dersch originally refused to concede that he had, in fact, double-counted these costs (Tr. 97-98), this error was conceded by the Government in its post-hearing brief. See Government Post Hearing Brief at 7. This factor, by itself, would result in a lowering of Dersch's mining costs to either $416 or $672 per day, depending upon the approach taken. 8/

Moreover, counsel was also critical of Dersch's computation of wage costs. Counsel asked Dersch why he had not, in computing wage rates, followed the directive provided by the BLM Handbook for Mineral Examiners to the effect that, "[f]or a small mom and pop operation, the standard for wages is the minimum wage; not union or contract wage scales" (Exh. MC/D-4 at V-9). Dersch responded that while he used the minimum wage as a component in developing a wage figure, he did not use it as the sole source for labor costs because he did not believe that individuals with the necessary

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8/ This varying result is dependent upon whether, for purposes of correcting the double count, one deletes the "drifting" costs as set forth by Krumlauf, with an adjustment for inflation (as contestees would prefer) or the actual wage computations which Dersch made (as the Forest Service suggested was the correct approach in its post-hearing brief).

training could be found who would work for that level of compensation. See Tr. 69-72. Dersch admitted, however, that, if the minimum wage figure was utilized, labor costs would only amount to a total of $141.44 per day, assuming four workers working an 8-hour shift (Tr. 73-74).

Dersch was the last witness called by the Forest Service in its case-in-chief. At the completion of the Forest Service's case, counsel for contestees made a motion to dismiss the complaint asserting that the Forest Service had failed to establish a prima facie case in support of its complaint. Judge Rampton explained that he would not rule on the motion at that time, stating that contestees could either rest without presenting evidence and rely on their motion to dismiss or, in the alternative, proceed with the presentation of their evidence, but run the risk that in doing so defects in the Forest Service's prima facie case might be remedied by contestees' evidence (Tr. 134-37). After some further discussion, the Judge ruled on counsel's motion as follows: "I'm going to say at this time [that the issue of whether the Government presented a prima facie case] is preserved, and I'll review that before I'll review [contestees'] testimony. And if I find that a prima facie case hasn't been made, I will dismiss the charge" (Tr. 140). 9/

Three witnesses testified for appellants: a geologist, Fred C. Grigsby, and the two contestees, Marjorie and Robert Miller. Grigsby,

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9/ We note that, immediately prior to making this statement, Judge Rampton had advised claimants that "[a]t this point I would think that it would be better for you to put on your case" (Tr. 138).

who never visited the claim but did review Dersch's report, testified that the Millers had made a discovery on the surface of the claim where the vein is exposed (Tr. 145-46, 160, 173-75, 177). Regarding the underground development, Grigsby stated that if the prospect were presented to a company, a company "would consider * * * that additional work should be done" (Tr. 147). He explained that surface material exposed along the vein could be mined by slusher drift in order to provide revenue for further underground development (Tr. 147-49). Grigsby testified that the area of the claim "appears to be mineralized," and "would warrant further development or more work," and that somebody like the Millers "could expect to develop some good ore at a profitable operation" (Tr. 155-56). Grigsby did some value calculations but included no transportation, beneficiation, or milling costs (Tr. 168). Grigsby thought Dersch's samples indicated "a reasonable potential" (Tr. 169). He thought that "a good potential" must be assumed "until it's disproven" (Tr. 172). Grigsby knew of no production from or development of the mine except that the Millers' opening of the Van Boxel shaft was "certainly an effort on their part to determine the potential or the mining values at depth" (Tr. 174).

Marjorie Miller, a chemist, testified that her father staked five claims in the Porphyry Basin, including the Robin Red Breast, and that he did a lot of exploration work on the claims (Tr. 180). Her father's partner had some samples assayed, one of which came from the Van Boxel shaft and showed gold values of 2-1/2 ounces of gold per ton. However, she did not know where those assays were at the time of the hearing (Tr. 180).

The Millers took samples in 1983, 1986, and 1988, and delivered them to Root & Norton in Silverton, Colorado, for assay. The results of those assays are set forth in exhibit MC/D-6. Marjorie Miller testified that she annotated the assay sheets to describe where the samples were taken (Tr. 197). The sample having the highest gold value, 0.948 ounce per ton, was taken in 1983, and described as "several pieces from the pile of ore next to Van Boxel's bucket on the floor of the shaft" (Exh. MC/D-6). The Millers found the bucket, which they described as Van Boxel's bucket, underneath all the material, when they "finally reached the bottom of the shaft" (Tr. 196; Exh. MC/D-27 at 7).

On cross-examination, Marjorie Miller admitted that, although her family had held the land in question under claim for at least 60 years, there had been no mineral production from the claim (Tr. 228). She asserted that their development of the claim was interrupted by the wilderness designation (Tr. 228-29). She stated that it would take several years of work before production could occur, but that discovery "was proven when we discovered Van Boxel's ore in his shaft," and that a mill could probably be built to process "whatever type of ore" is in the main ore body (Tr. 229-30). In response to the question of their "plan for transporting what is on site off the site," she stated that they would transport it out by "pack train" (Tr. 230).

Robert Miller, an employee of the Department of the Interior, Bureau of Indian Affairs, Natural Resources and Engineering Laboratory, testified that a discovery was made in the Van Boxel shaft when they found ore

next to the bucket (Tr. 240-41). 10/ He recalled that Dersch had declined to sample the pile of ore because "[h]e said that wasn't in place, and he wasn't allowed to sample it" (Tr. 240-41). Robert Miller's testimony completed contestees' presentation of evidence.

In its rebuttal to Marjorie Miller's suggestion that ore would be transported from the claim by pack train, the Forest Service recalled French to inquire with respect to the economics of transporting ore from the site by means of pack horse. He stated that he thought the "going rate" for a pack horse rented from a commercial livery was "between $80 and $100 a day per animal" (Tr. 245). He further stated that one horse could carry up to 200 pounds of ore, and that considering the location of the claim and distances, two round trips might be possible in a 9-hour day (Tr. 245-46).

Following the close of the hearing, contestees filed both a post-hearing brief and a motion to dismiss based on their assertion that the Forest Service had failed to present a prima facie case of invalidity during the presentation of its case-in-chief. The Forest Service filed its own post-hearing brief as well as a response to the motion to dismiss. As

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10/ We note that, under 43 CFR 20.735-23(b)(3), all Departmental employees "are prohibited from acquiring or retaining any claim, permit, lease, small tract entries, or other rights in Federal lands either in their own name or in the name of their spouse, dependent children, or solely-owned or family-owned business except [as provided] * * * in paragraph (e) of this section." The present record does not disclose whether Robert Miller qualifies for such a waiver.

noted above, on November 12, 1993, Judge Rampton issued his decision finding that the Forest Service had presented a prima facie case of invalidity and that contestees had failed to overcome this showing by a preponderance of the evidence.

In his decision, Judge Rampton first recounted the evidence adduced at the hearing. In doing so, however, Judge Rampton expressly noted that Dersch had made two separate computational errors in his economic analysis. Thus, he agreed with contestees that an improper double counting had occurred with respect to production costs (Decision at 3-4). The Judge rejected the inclusion of the drifting costs projected by Krumlauf, instead relying upon the labor costs computed by Dersch based on his survey of neighboring mines. 11/ Judge Rampton, therefore, concluded that the direct mining costs associated with mining a 4-foot drift would be $416.75 as of the date of the withdrawal and $465.36 as of the date of the hearing (Decision at 4). 12/

Judge Rampton, in effect, determined that the proper way to ascertain value was to compare the per ton values derived from the assay of sample

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11/ In doing so, he necessarily rejected both the reliance on the Krumlauf costs which the Forest Service had urged in its post-hearing brief (see note 8, supra), as well as the contestees' arguments that computations should be based on a 3-foot mining width and that the proper valuation of labor costs should be limited to the minimum wage.

12/ Due to an arithmetic error, the Judge stated that the direct costs for 4 feet of drifting on the withdrawal date was $406.75. He subsequently divided that figure by 11.2 tons to get $36.32 as the cost per ton on the date of withdrawal. We have made the necessary corrections in the text of this decision.

No. 775 ($54.67 as of the date of the withdrawal and $64.87 as of the date of the hearing) with the per ton costs of production. As a preliminary matter, however, it was necessary to determine a tonnage figure for the amount of material which would be mined each day.

Judge Rampton recognized that Dersch's analysis was critically flawed on this point. Thus, the Judge noted that:

> A second error in Mr. Dersch's economic analysis occurred in his calculation of the revenue to be expected from mining the claim, whereby he incorrectly multiplied the expected revenue from one ton of mined material (ore and waste) by the expected tonnage of recoverable metal from a 4-feet advance in the drift to arrive at the expected revenue from a 4-feet advance in the drift (see Tr. 74-85, 87-89, 99-105, 117-130, Ex. FS-2, pp. 9-11).

(Decision at 4 n.2). The Judge concluded that the correct way to determine tonnage for the purpose of ascertaining value was to multiply the weight per cubic foot of andesite 13/ (160 pounds) by 140 cubic feet, which figure represented the total volume mined under Dersch's analysis. Under this approach, 11.2 tons of material would be mined each day. Judge Rampton divided this figure into the mining costs of $416.75 (date of withdrawal) and $465.36 (date of the hearing), arriving at a figure showing per ton production costs of $37.21 and $41.55, respectively.

As Judge Rampton noted, under this approach the value of production would exceed the costs of mining both on the date of the withdrawal (by

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13/ Judge Rampton recognized that andesite was the lightest of the constituent substances making up the material being mined (Decision at 4 n.1).

$17.46 per ton) as well as the date of the hearing (by $23.30 per ton). Notwithstanding this conclusion, however, he subsequently determined that the Government had presented a prima facie case of no discovery. Preliminary to this determination, however, he recounted the assurances which he had provided contestees' counsel that he would review only the evidence presented by the Forest Service in its case-in-chief to determine whether or not a prima facie case had been presented. He held, however, that this assurance was

> in error for it is not in accordance with the law or my cautionary statements to the Millers that any evidence presented by them may remedy any deficiency in the Government's case-in-chief. By law, I must consider all evidence presented by both parties in determining whether the Government presented a prima facie case.

(Decision at 7). Judge Rampton then addressed the question as to the existence of a prima facie case based on a review of the entire record:

> The entire record clearly shows that the Government established a prima facie case of lack of a valid discovery on the claim. The projected profits of $17.46 per ton on the date of withdrawal and $23.30 per ton on the date of the examination, exclusive of capital, transportation, beneficiation, and milling costs, evaporate if transportation costs are considered. The transportation costs amount to $400 per ton ($80 per horse per day multiplied by 5, the number of days it would take one horse, carrying 200 pounds per trip and making 2 trips per day, to transport 2000 pounds of ore). Thus, exclusive of capital, beneficiation, and milling costs, the projected loss is $382.54 per ton on the date of withdrawal and $376.70 per ton on the date of examination.

(Decision at 7-8).

Judge Rampton further concluded that the contestees had not overcome this showing, expressly rejecting their assay samples because there was insufficient information to determine the quantity and quality of any mineral deposit or even whether the samples were fairly representative of the mineralized zone. He noted that Grigsby's testimony, even if accepted, did not deal with the problem of transportation costs, emphasizing that the cost estimates of French were unchallenged at the hearing (Decision at 9). He expressly rejected contestees' reliance on the BLM Handbook for Mineral Examiners pointing out that, not only was the Handbook merely a guide which lacked the force and effect of law, but that, to the extent that contestees' sought to rely upon the Handbook as requiring that the value of their labor be based on the minimum wage, such an approach was directly contrary to this Board's determination in United States v. Garner, 30 IBLA 42, 67 (1977), that "[t]here is no reason to consider the value of the labor of a locator or the use of his mining equipment any differently from that which he might hire" (Decision at 9). Based on his conclusion that an examination of the entire record showed that the Forest Service had established a prima facie case and that this case was not overcome by contestees' evidentiary submissions, Judge Rampton determined that the Robin Redbreast Lode mining claim was null and void (Decision at 10).

On appeal, appellants assert that Judge Rampton erred in reversing his ruling at the hearing that he would review only the Forest Service's case-in-chief in determining whether a prima facie case was made and dismiss the contest, if it had not. In his decision, Judge Rampton recognized that his ruling was, in fact, contrary to existing case law. Appellants contend,

however, that, correcting for Dersch's errors, the Forest Service's own evidence showed the validity of their claim and that Judge Rampton basically relied on "an outlandish $400 per ton transportation cost," put forth by the Forest Service solely in its rebuttal testimony, to support his conclusion that the Forest Service had presented a prima facie case (Statement of Reasons (SOR) at 4).

Appellants assert that the Judge's use of this evidence, in contravention of his assurances at the hearing, "blind-sided" them, was reversible error, and resulted in a denial of fundamental fairness and due process (SOR at 4; Reply Brief at 9). Appellants complain that the Forest Service's use of the packhorse evidence belatedly raised an issue never properly raised as part of the Forest Service's case which then became "the central linchpin of the government's position" (Reply Brief at 2). Relying on this Board's holdings in United States v. Pool, 78 IBLA 215, 220 (1984), United States v. Dresselhaus, 81 IBLA 252, 257 (1984), and Cactus Mines Limited, 79 IBLA 20, 31 (1984), appellants argue that, in any event, they were not required to address transportation costs because the issue was not raised in the Forest Service's case-in-chief. Moreover, appellants contend that the Judge's original ruling at the hearing "was not clearly erroneous," and that the doctrine of "the law of the case" should be applied to sustain that ruling (SOR at 6-7; Reply Brief at 5). In essence, appellants allege that the Forest Service had failed in its case-in-chief to present a prima facie case and that their motion to dismiss, made at the hearing, should have been granted (SOR at 7). Further, they assert that, but for

the Judge's assurance, repudiated in his decision, that he would not consider evidence submitted after the close of the Forest Service's case-in-chief in determining whether or not a prima facie case had been made, appellants would not have tendered any evidence and would have rested on their motion.

For its part, the Forest Service contends that a prima facie case of no discovery was presented, that the Judge properly so found, and that appellants failed to present preponderating evidence to overcome that case. It concludes that the Judge properly declared the Robin Redbreast Lode mining claim invalid.

[1] Our review of the record convinces us that a number of errors occurred in this case. Initially, we note that Judge Rampton declined to rule on the motion to dismiss which appellants had presented upon the completion of the Forest Service's case-in-chief. This was error. In United States v. Galbraith, 134 IBLA 75, 102 I.D. 107 (1995), a decision issued subsequent to Judge Rampton's decision herein, we dealt with another case in which the presiding judge failed to rule on a motion to dismiss for failure to present a prima facie case. Therein, we noted:

> A motion to dismiss for failure to present a prima facie case loses its essential value if it is not ruled upon before a contestee is required to proceed with its case. The administrative law judge's ruling is absolutely critical in correctly ascertaining whether or not to proceed since, in many cases, challenges to credibility constitute a vital element in the contestee's case. Given the weight afforded by this Board to determinations of credibility based on demeanor evidence by an administrative law judge (see, e.g., BLM v. Carlo, 133 IBLA 206

> (1995)), a contestee cannot fairly be forced to decide whether to present his or her own evidence or rely on the failure of the Government to present a prima facie case in the absence of a ruling by the judge on the motion to dismiss.
>
> We recognize that in certain cases involving complex factual scenarios or unusual legal arguments an administrative law judge might be reluctant to rule on the sufficiency of the Government's evidentiary showing absent reflection or research. The correct course of action in such circumstances, however, is to suspend the proceedings until such time as the judge is prepared to rule on the motion. Only after such a ruling has been entered can a contestee be fairly forced to choose between presenting additional evidence or standing on the motion and running the risk that he or she will never be afforded the opportunity to present evidence supportive of the claim. [Footnote omitted.]

Id. at 106-07. In the instant case, the effect of failing to rule on the motion was exacerbated by the assurances of the presiding judge that, in deciding whether a prima facie case existed, he would not consider any evidence presented by the contestees, particularly when coupled with his express observation that it would be "better" for the claimants if they proceeded to put on their evidence. 14/

[2] Moreover, we are constrained to note that the Judge misstated the prevailing rule of law when he declared in his decision that "I must consider all evidence presented by both parties in determining whether the Government presented a prima facie case" (Decision at 7). In fact, the Board has expressly held that the determination of whether or not the Government has presented a prima facie case is to be made solely on the evidence adduced during the Government's case-in-chief. Thus, in United States v. Knoblock, 131 IBLA 48, 101 I.D. 123 (1994), we noted that the:

14/ See note 9, supra.

> [D]etermination of the existence of a prima facie case is necessarily limited to the confines of the Government's case-in-chief. This includes, of course, testimony elicited in cross-examination. Where a contestee, as in the instant case, cross-examines a Government witness as to contrary conclusions reached in prior Government examinations of a claim, both the witness' response and the substance of the prior report, if admitted into evidence, are properly weighed in adjudicating whether or not a prima facie case has been established. To the extent that the fact-finder determines that the effect of cross-examination has been to effectively undermine any weight which might have been accorded the witness' direct testimony, the fact-finder could properly conclude that the Government has failed in its obligation to establish a prima facie case. [Emphasis in original.]

Id. at 84, 101 I.D. at 142-43. Accord, United States v. White, 118 IBLA 266, 276 n.10, 98 I.D. 129, 134 n.10 (1991); United States v. Copple, 81 IBLA 109, 120 (1984). Evidence presented by the contestees in their own case or later by the Government in any rebuttal to contestees' submissions is not properly considered in determining whether a prima facie case has been presented.

This is not to say that, in those situations in which the Government has failed to present a prima facie case, evidence submitted after the Government's case-in-chief is irrelevant. On the contrary, the Board has noted on numerous occasions that, even if the Government has failed to present a prima facie case, evidence tendered by a contestee may be considered, not for the purpose of curing any of the deficiencies in the Government's prima facie case, but rather for the purpose of determining whether or not this evidence, when considered in the context of all of the other evidence of record, affirmatively established that the claim

is invalid. See, e.g., United States v. Pool, supra. This is a critical distinction. Thus, we noted in Pool that:

> [T]he mere fact that the contestee elects to proceed with the presentation of his case does not mean that he therefore must preponderate on the issues raised in the contest. The requirement of preponderation only arises as to issues for which the Government has presented a prima facie case. Where there is no prima facie case, there can be no issue on which a claimant must preponderate. The only risk that the claimant runs is the risk that the evidence as a whole will prove that an element of discovery is not present. [Emphasis in original.]

Id. at 220. See also United States v. Opperman, 111 IBLA 152, 153 (1989), ("[I]f the contestee goes forward after the Government rests its case, any testimony presented by the contestee which is adverse to its interests may be utilized by the Administrative Law Judge for purposes of making a decision. However, such testimony can never be the basis for a finding that the Government did not establish a prima facie case.")

The initial question to be addressed with respect to the instant appeal is, therefore, whether or not the Forest Service presented a prima facie case of invalidity. We find that it did not.

[3] In general terms, "prima facie evidence" is evidence which is sufficient in law to sustain a finding in favor of a rule or order, but which may be contradicted. American Security Council Education Foundation v. FCC, 607 F.2d 438, 445-46 (D.C. Cir. 1979). In the context of a mining contest, it means, as we said in United States v. Bunkowski, 5 IBLA 102,

119, 79 I.D. 43, 51 (1972), that the case is adequate to support the Government's contest of the claims and that no further proof is needed to nullify the claims.

We believe it clear that, had Judge Rampton limited his consideration to the evidence presented in the Forest Service's case-in-chief, he would have ruled that the Forest Service had failed to present a prima facie case. Based on the Judge's calculations, the economics of development as disclosed by the record developed in the Forest Service's case-in-chief would be favorable to contestees, resulting in a profit per ton of either $17.46 at the time of the withdrawal or $23.30 at the time of the hearing. A reading of his decision makes it abundantly clear that the critical factor in his determination that a prima facie case had been presented was the consideration of transportation costs. There was, however, absolutely no evidence as to what these costs might be until the Forest Service examined French in its rebuttal case. 15/

Though our own consideration of the facts of record results in figures varying from those computed by Judge Rampton, we reach the same conclusion

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15/ While it is, of course, true that Dersch had mentioned milling and transportation costs in his direct examination (see Tr. 58), he provided no evidence as to what these costs might be. The mere raising of the specter of other costs, absent some indication as to what they might entail, is insufficient to put a claimant to any proof on the issue. In other words, there must be some basis presented in the record for the administrative law judge to ascertain what those costs might be. In the instant case, the testimony of French upon which Judge Rampton relied to estimate transportation costs, was not presented during the Forest Service's case-in-chief and, therefore, could not be considered in determining whether or not a prima facie case had been made.

that, ignoring transportation or milling costs, the costs of mining would not be greater than the returns which might be expected to inure to the contestees. Our computations differ from those of Judge Rampton in that we believe the Judge erred in determining the values likely to result from mining the ore zone.

While we do not disagree with Judge Rampton's computation of the total tonnage which would be mined (11.2 tons), the problem which we have is that he multiplied this figure by the assay values obtained from sample No. 775. What this approach ignored, however, was the testimony that the mineralized zone was only 39 inches in width. Thus, assuming a 5-foot mining width, approximately 35 percent of the tonnage mined would consist of waste material. By contrast, sample No. 775 was a 52-inch channel cut taken across a vein system 40 inches in width. In other words, while the waste material would account for only 23 percent of the material being assayed, it would be approximately 35 percent of the material being mined. Judge Rampton, in effect, overstated the values which would be obtained from mining, assuming a 5-foot wide by 7-foot high drift with a 4-foot advance per day.

Dersch, on the other hand, had attempted to address the problem of waste material in his report. He computed that of the 141 cubic feet of material mined, approximately 91 cubic feet would be material from the mineralized zone (Exh. FS-2 at 8). Multiplying this total by the weight of andesite results in a total of 7.28 tons of vein material. See Tr. 114, 117. Assuming a value of $54.67 per ton at the date of the withdrawal and

$64.87 per ton at the date of the hearing, the total daily value based on the above assumptions would be $397.99 and $472.25, respectively. Inasmuch as the mining costs which Judge Rampton utilized were $416.75 at the date of the withdrawal these computations would arguably support the Judge's ultimate conclusion that a prima facie case had been presented.

There are, however, two discrete problems with these figures. First of all, while, as indicated above, Judge Rampton's computation effectively overstated the value, Dersch's approach understates the value. The reason for this is that, while Dersch's approach isolates the tonnage in the mineralized zone, the assay on which value is being predicated included approximately 23 percent of waste material. Adjusting the assay figures to compensate for the inclusion of waste material results in a total per ton value of $67.24 as of the date of the withdrawal and $79.79 as of the date of the hearing. Utilizing these adjusted figures, the per day return rises to $489.50 for the date of the withdrawal and $580.87 for the date of the hearing.

Moreover, there is a substantial question, raised by appellants in their cross-examination of Dersch, as to the propriety of utilizing a 5-foot mining width in derogation of a 3-foot mining width, mentioned in the BLM Handbook for Mineral Examiners. While Dersch agreed that use of a 3-foot mining width would result in the mining of less waste, he was never able to explain why he did not use this width in his calculations, other than the fact that the 5-foot mining width was utilized in Krumlauf's analysis. Use of a 3-foot mining width, if feasible, would certainly

result in an increase in the net return to appellants since, given a 39-inch ore zone, no waste rock would be mined.

[4] Appellants, for their part, challenge the cost figures used by Judge Rampton because they were based on Dersch's survey of prevailing wage rates. See note 6, supra. They contend, based on the BLM Handbook for Mineral Examiners, that wage rates for a "mom and pop" operation such as they envisage, should be based solely on the minimum wage. As we noted above, Judge Rampton rejected this contention, relying on this Board's decision in United States v. Garner, supra. On this issue, we find ourselves in agreement with Judge Rampton.

It is an oft-repeated truism that the prudent man test is an objective test. See, e.g., United States v. Oneida Perlite Corp., 57 IBLA 167, 189-190, 88 I.D. 772, 784-85 (1981); United States v. Slater, 34 IBLA 31, 40 (1978). It was because of the fact that we recognized that the prudent man test was an objective standard that we have rejected attempts by claimants to assert that they would have no equipment costs because they intended to use equipment which they already owned. See, e.g., United States v. Feezor, 130 IBLA 146, 222 (1994). And it was because of the objective nature of the test for discovery that we expressly held, in United States v. Wirz, 85 IBLA 350 (1985), that "labor costs must be considered in determining whether a particular operation has a reasonable prospect of success, and the value of the labor of an individual mining claimant is not to be treated any different than that of one he might hire." Id. at 358 (emphasis supplied).

We recognize that a number of Board decisions have, through a negative inference, seemingly embraced the minimum wage as a proper standard for determining labor costs with respect to small "mom and pop" mines. However, none of these decisions directly held that the minimum wage was the correct value of a claimant's labor. Rather, what these decisions have in common is that, in examining admittedly small projected returns from placer gold operations, they noted that either Government experts had testified or the evidence showed the anticipated revenues "would be far below what a person would receive at the minimum wage." United States v. Rouse, 56 IBLA 36, 40J (1981). See also United States v. Corns, 53 IBLA 5, 14 (1981); United States v. Page, 43 IBLA 390, 392-93 (1979); United States v. Lambeth, 37 IBLA 107, 110 (1978). 16/ Not only did none of these decisions expressly mandate use of the minimum wage for imputing labor costs in such operations, but, more importantly and unlike the instant appeal, in none of these appeals was there any evidence that the value of the labor involved (primarily panning and sluicing) was greater than the minimum wage.

Correctly viewed, the minimum wage merely establishes the floor for determination of the value of the claimant's labor. Where, however, there is independent evidence establishing the value of the labor necessary to mine a deposit, it is that value which is properly used to determine whether or not a prudent man would expend his effort and means to

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16/ Indeed, in some cases, claimants argued that their claims were valid even though they would return less than the minimum wage because the claimants were personally willing to work for less. See United States v. Johnson, 59 IBLA 207, 208-09 (1981); United States v. Anderson, 57 IBLA 256, 259 (1981).

develop a paying mine. 17/ The willingness of a claimant to accept less than the market value of his labor represents a subjective value judgment on the part of that claimant. In effect, for reasons unrelated to the economics of development, the mining claimant is subsidizing the operation of the claim by undervaluing his labor. The validity of the claim, however, must be premised on the objective economics surrounding the proposed mining venture. In view of the fact that the record developed at the hearing provided an evidentiary basis for concluding the value of the labor involved was in the range of $12.53 to $15 for a miner and $9.50 to $11.30 for a mucker (see Exh. FS-2 at 7), Judge Rampton correctly rejected appellants' request that their labor be valued at minimum wage.

Notwithstanding the foregoing, it is our view that, weighing the evidence adduced during the Forest Service's case-in-chief under our de novo review authority and applying the correct legal standards, the Forest Service failed to establish a prima facie case of invalidity. 18/ However,

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17/ In this regard, we note that there was no reason to include the minimum wage as an element in computing wage costs (see Exh. FS-2 at 7) in this case since there was independent evidence showing that the value of the labor necessary to mine the deposit was far in excess of the minimum wage.

18/ We recognize that there could be some question as to the applicability of our holding in United States v. Hess, 46 IBLA 1 (1980), to the instant case. In Hess, we held that uncontradicted evidence of the absence of production over an extended period of time may, in and of itself, establish a prima facie case of invalidity. Id. at 7-9. As we explained in United States v. Knoblock, supra at 88, 101 I.D. at 144: "This rule reflects the principle that, given the varying economic conditions present over a period of many years, a mining claim will usually be developed unless it is not commercially feasible to do so profitably. In other words, the best evidence of what a prudent man would do is what a prudent man has done." (Citation omitted.) In this case, while the specific claim was located in 1980, appellants have held the land for mining purposes since the early 1950's. This is more than a sufficient amount of time in which to bring the "extended nonproduction" rule into play.

while the record would have, indeed, supported a decision by Judge Rampton to dismiss the contest at the close of the Forest Service's case-in-chief, the fact remains that Judge Rampton failed to do so and that appellants proceeded, albeit under a misapprehension of the consequences, to submit evidence on their own behalf. Thus, we must consider the entire record, not for the purpose of ascertaining whether a prima facie case has been presented, but rather for the more limited purpose of determining whether the record, as a whole, affirmatively shows that the claim is invalid.

[5] To the extent that appellants argue that any consideration of testimony beyond that adduced in the Forest Service's case-in-chief should be barred under the doctrine of "law of the case," they are mistaken, at least insofar as this Board is concerned. The "law of the case" doctrine works to preclude a court from reexamining an issue previously decided by the same court or by a higher court in the same case. See A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1418 (9th Cir.), cert.

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fn. 18 (continued)

The problem, however, is that, if the Forest Service desired to utilize the extended nonproduction of the claim as a basis for its case, it was necessary that it alert contestees of this fact, either in the complaint or at the hearing. See United States v. McElwaine, 26 IBLA 20 (1976). Not only did the Forest Service fail to put contestees on fair notice, it is affirmatively clear from its post-hearing brief that the Forest Service, itself, did not consider this to be an issue. Thus, the Forest Service dismissed certain evidence elicited by contestees' counsel with the observation that "private counsel's extended odyssey during cross examination into topics such as Forest Service policy on claims in wilderness, possible prior contest proceedings, or plumbing the depths of 10 years worth of operating plan proposals/counterproposals appear to be irrelevant to any case issue" (Government Post-Hearing Brief at 5). Since much of the above-described evidence would be germane to the question of appellants' failure to develop the claim in recent years, it could only be concluded that the Forest Service was not basing its case on extended nonproduction.

denied, 476 U.S. 1117 (1986). It does not, however, preclude a reviewing court from reversing a ruling of a trial court on direct review of that decision. Thus, insofar as the Board's review is concerned, nothing in the "law of the case" doctrine negates either the Board's authority or its obligation to correctly apply the prevailing legal precedents, notwithstanding any contrary ruling by an administrative law judge rendered in the course of a hearing. 19/

Viewing the record in its totality, we cannot say that the evidence establishes that the claim is invalid. It is clear that the evidence which Judge Rampton found most critical was the testimony by French with respect to the cost of transportation using pack horses. French's testimony, offered in the Forest Service's rebuttal case, was to the effect that the going rate for renting a pack horse from a horse livery was between $80 to $100 per day and that a single horse might be able to carry 200 pounds of ore on every trip, making two round trips each day. From this, it was concluded that the transportation costs would exceed $400 per ton of ore. This is the sole basis on which estimates of transportation costs were made.

19/ While the Board cannot be estopped by erroneous rulings of an administrative law judge from applying the correct legal standard on review of an appeal, the extent to which such an erroneous ruling may have affected the fundamental fairness of the hearing process is a matter which is properly considered in such an appeal. In the proper circumstances (see, e.g., United States v. Galbraith, supra), the Board may order a new hearing to rectify any manifest injustice which might result from correction of the erroneous ruling. In light of our disposition of the instant appeal, however, there is no need to follow this course of action herein.

The problem with the foregoing, as alluded to by appellants in their SOR, is that there is no evidence that, assuming pack horses would be used as the mode of transportation, a prospective mining operation would rent such horses for $80 to $100 per day, as opposed to purchasing such horses outright. 20/ In other words, while we might accept French's testimony as establishing commercial livery rates, there is no evidentiary basis for concluding that appellants would use a commercial livery's services to obtain pack horses.

Dersch, the Forest Service's mineral examiner, had eschewed making any estimates of transportation or milling costs, based on his calculations (subsequently shown to be erroneous) that the costs of mining far exceeded any conceivable return from the minerals mined. Thus, transportation costs formed no part of the Forest Service's case-in-chief and were not analyzed in the Forest Service's Mineral Report. Since, as explained above, there was no prima facie case, appellants did not have an affirmative obligation to rebut French's estimate that transportation costs would be $400 per ton, if they utilized the services of a commercial livery. Rather, the question is whether the record, taken as a whole, is sufficient to establish

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20/ Included in appellants' SOR was a declaration by Marjorie Miller referencing various conversations with representatives of local livestock auction yards reporting that the price for a pack horse, as of 1993, varied from $500 to $700. While we recognize that, as a general rule, proffers of evidence tendered on appeal may only be considered for the purposes of determining whether or not a new hearing should be ordered, we believe the figures provided in the declaration are indicative of the general problem entailed in relying on figures derived from the rental rates of commercial liveries for the purposes of assessing costs which might reasonably be expected to be incurred in transporting ore from the claim.

the invalidity of the claim. Absent some evidence that appellants would, indeed, use a commercial livery service, we do not believe that it is. Accordingly, we must reverse the decision of Judge Rampton and dismiss the contest complaint.

This is not to say that appellants have affirmatively established the validity of their claim. As we noted in United States v. Hooker, 48 IBLA 22 (1980), "dismissal of a contest complaint does not determine the validity of the claim, but merely establishes that, as to the issues raised in the hearing, the mineral claimant has preponderated." Id. at 26-27. The Forest Service, in essence, chose to challenge the claim on the theory that the cost of mining exceeded the value of the mineral being recovered. As shown above, the facts of record simply failed to substantiate this theory. Regardless of the failure of the Forest Service to present viable estimates of transportation and milling costs, the reality is that such costs must, as a practical matter, be absorbed if the proposed mining venture is to be successful. It may well be that, after reexamining this question, the Forest Service will decide that there is not a reasonable likelihood that the mineral from the claim can be mined, milled, and marketed at a profit. Nothing in our decision, herein, prevents it from requesting BLM to initiate a new contest based on a new mineral examination and report. We merely hold that, based on the present record, the Forest Service has failed to establish a prima facie case of invalidity and that nothing in that record affirmatively established that the Robin Redbreast Lode mining claim was invalid.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Rampton holding the Robin Redbreast Lode mining claim null and void is reversed and the contest complaint is dismissed.

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James L. Burski
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge